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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

NCHF AMS II HOUSTON, LLC, et al.

Plaintiffs and Appellants,

v.

STEPHEN KAPLAN,

Defendant and Respondent.

D075842

(Super. Ct. No. 37-2-12-00057479-
CU-BC-NC)

APPEAL from a judgment of the Superior Court of San Diego County, Jacqueline M. Stern, Judge. Reversed and remanded with directions.

Williams Iagmin and Jon R. Williams for Plaintiffs and Appellants.

The Stone Law Group, Kenneth H. Stone and Phillip J. Szachowicz for Defendant and Respondent.

The trial court entered a judgment confirming an arbitration award for defendant. Plaintiffs appeal, and we reverse. The arbitration award was outside the arbitrator's authority because the scope of the arbitration was inconsistent with our directions in a prior appellate decision, *Emerald Aero, LLC v. Kaplan* (2017) 9 Cal.App.5th 1125

(*Emerald Aero*). We direct the superior court to vacate the award and we remand with specific directions. (Code Civ. Proc., § 1286.2, subd. (a)(4).)¹

OVERVIEW

In 2017, this court reversed a judgment confirming a \$30,835,152.57 arbitration award (consisting of both compensatory and punitive damages) against Stephen Kaplan. (*Emerald Aero, supra*, 9 Cal.App.5th 1125.) Although Kaplan challenged the award on several grounds, we found only one contention was meritorious: the arbitrator exceeded his authority in awarding punitive damages because plaintiffs did not provide adequate notice of their punitive damages claim. We determined this lack of notice violated the parties' arbitration agreement and fundamental procedural fairness principles. (*Id.* at p. 1129.)

We ordered the award vacated under section 1286.2, subdivision (a)(4), which provides a court "shall vacate [an arbitration] award if the court determines . . . [t]he arbitrator[] exceeded [his] powers *and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.*" (Italics added.) Under this code section, we concluded it was not possible to correct the award by striking the punitive damages because the \$30 million award consisted of both compensatory and punitive damages without differentiation. (*Emerald Aero, supra*, 9 Cal.App.5th at p. 1146.) We thus remanded for a new arbitration hearing *on damages only*. (*Ibid.*) Specifically, our Disposition stated: "Judgment reversed as to Kaplan. The matter is

¹ All unspecified statutory references are to the Code of Civil Procedure.

remanded with directions for the superior court to (1) vacate the judgment confirming the arbitration award as to Kaplan and (2) issue an order vacating the arbitration award against Kaplan and remanding for a new arbitration hearing *on plaintiffs' damage claims against Kaplan.*" (*Ibid.*, italics added.)

On remand, the superior court followed this direction and ordered the matter to arbitration "on plaintiffs' damage claims against Kaplan." However, the new arbitrator—over plaintiffs' objections—vacated both the liability and damage findings and permitted the parties to relitigate all issues. The arbitrator then held an evidentiary hearing, and found plaintiffs did not prove their liability claims and thus never reached the damage issues. The arbitrator issued an award for Kaplan and awarded him \$258,181.03 in attorney fees plus interest.

The trial court granted Kaplan's petition to confirm the arbitration award and entered judgment in his favor. In so doing, the court rejected plaintiffs' arguments that the arbitrator acted beyond the scope of his authority by permitting the parties to relitigate liability issues.

Three of the plaintiffs appeal.² They contend the trial court erred in confirming the arbitration award because the second arbitrator acted beyond the scope of his authority in permitting Kaplan to relitigate the liability issues. We agree and reverse. We provide specific directions for the trial court and arbitrator on remand.

² Although there were four plaintiffs in the proceedings below (Emerald Aero, LLC; NCHF AMS II Houston, LLC; JWC AMS II Houston, LLC; and Scott Rogers), only the latter three have appealed.

RELEVANT FACTUAL AND PROCEDURAL SUMMARY

A. Background Information

In 2012, plaintiffs filed a complaint against Kaplan and two others.³ Plaintiffs alleged that in 2008 Kaplan offered them an opportunity to invest in a Texas self-storage facility through memberships in limited liability companies. The property was allegedly valued in excess of \$5 million, and approximately \$2.9 million was financed through a private lender under a promissory note (Note). After plaintiffs purchased their investment interests, Kaplan (or an affiliate) allegedly purchased an interest in the Note. The property allegedly later went into financial "distress."

Plaintiffs asserted three causes of action: (1) breach of fiduciary duty; (2) aiding and abetting breaches of fiduciary duty and/or participation in a fraudulent scheme; and (3) quiet title. As their central claim, plaintiffs alleged Kaplan engaged in schemes to redirect benefits intended to go to the investors, and obtained "unfair financial benefits." Specifically, plaintiffs claimed Kaplan breached his duties by: mismanaging property assets and distribution funds; purposefully keeping the property underfunded; engaging in self-dealing; failing to disclose the property's financial condition; and engaging in wrongful acts with respect to the purchase and sale of the Note. Plaintiffs sought "actual and consequential damages in excess of \$10,000,000 to be proven at trial." There was no mention of punitive damages.

³ Because Kaplan is the only defendant before us, we describe the claims against him and do not discuss facts pertaining to the other defendants.

In March 2013, the superior court granted Kaplan's motion to compel arbitration based on an arbitration provision in the parties' contract.

B. *First Arbitration Proceedings*

In January 2014, plaintiffs submitted the matter to the American Arbitration Association (AAA). (*Emerald Aero, supra*, 9 Cal.5th at p. 1132.) In their claim summary, plaintiffs identified \$1 million as the claim amount, and described their claim as follows: " 'Plaintiffs base their claim as . . . outlined in [their] complaint . . . which includes allegations of fraud, breach of fiduciary duty and aiding and abetting. For money damages Plaintiffs have reasonably incurred to clear the cloud on Plaintiffs['] title to the Property and to prevent the sale of the Property by Defendants and such other damages to be proved at arbitration.' " (*Ibid.*) An arbitrator issued an order stating the complaint would " 'be treated as the claim.' " (*Ibid.*)

Kaplan sought a stay of the arbitration proceedings because he was the subject of federal criminal proceedings involving his management of self-storage properties, including the facility at issue in plaintiffs' case. (*Emerald Aero, supra*, 9 Cal.App.5th at p. 1132.) The stay was granted in November 2014.

In April 2015, plaintiffs asked that the arbitration be reinstated, stating the criminal investigation had concluded after Kaplan entered a guilty plea. (*Emerald Aero, supra*, 9 Cal.App.5th at pp. 1132-1133.) This request was granted and an evidentiary hearing was scheduled for June 2015. (*Id.* at p. 1133.) However, the hearing was delayed when Kaplan's attorney withdrew from the representation. (*Id.* at pp. 1133-1134.)

During the next month, plaintiffs asked for a new hearing date, and the arbitrator responded by informing plaintiffs they should file a motion to schedule the hearing. (*Emerald Aero, supra*, 9 Cal.App.5th at p. 1134.) Plaintiffs then moved for the arbitrator to schedule a "default prove up hearing." (*Ibid.*) Plaintiffs said that because Kaplan had not appeared at an earlier scheduling conference and had not " 'participated in pre-hearing discovery or disclosures,' " he should be " 'barred from presenting evidence' " at the hearing. (*Ibid.*) Plaintiffs' counsel stated he would " 'present their case by and through a detailed arbitration brief and brief witness testimony to walk the arbitrator through the documents.' " (*Ibid.*)

On August 13, the AAA sent a notice of hearing to Kaplan's home address and to plaintiffs' counsel's email address stating that an evidentiary telephonic hearing would take place on September 1, 2015 at 2:00 p.m. (*Emerald Aero, supra*, 9 Cal.App.5th at p. 1135.) Kaplan did not respond to this notice, and did not seek a continuance or stay of the hearing date. (*Ibid.*)

On August 31, one day before the scheduled hearing, at 4:38 p.m. plaintiffs' counsel sent an email to the AAA administrator with a "cc" to the arbitrator and to Kaplan, stating: " 'Attached please find [plaintiffs'] default prove up brief for tomorrow's hearing along with a supporting declaration and proof of service.' " (*Emerald Aero, supra*, 9 Cal.App.5th at p. 1135.) In this new brief, plaintiffs requested \$10,278,384.19 in damages. Additionally, for the first time, plaintiffs sought punitive damages and requested a " 'multiplier of three (3x) the actual damages.' " (*Ibid.*)

The next day, on September 1, the arbitrator held a telephonic evidentiary hearing. (*Emerald Aero, supra*, 9 Cal.App.5th at p. 1135.) Kaplan did not appear, or provide any written response. (*Ibid.*) During the hearing (which was not recorded or transcribed), plaintiffs presented their evidence and referenced their August 31 arbitration brief. (*Ibid.*)

The arbitrator's "Final Award" stated: " 'Whereas, the default evidentiary hearing in this matter was held telephonically . . . , and [¶] Whereas, appearing at the hearing telephonically was [plaintiffs' attorney]. [¶] . . . [¶] . . . [Plaintiffs] are . . . awarded damages against [Kaplan] in the amount of \$30,835,152.57. [¶] . . . This award is in full settlement of all claims submitted to this Arbitrator.' " (*Emerald Aero, supra*, 9 Cal.App.5th at p. 1135.)

Several weeks later, Kaplan's new attorney filed a motion with the AAA requesting the arbitrator to set aside the arbitration award, asserting that (1) Kaplan lacked notice that plaintiffs would be seeking punitive damages; and (2) Kaplan had been advised by his criminal defense counsel not to testify in the civil case because his sentencing/restitution hearing was pending. (*Emerald Aero, supra*, 9 Cal.App.5th at p. 1136.) Plaintiffs opposed the motion. (*Ibid.*)

About two weeks later, an AAA administrator notified the parties that the arbitrator was " 'recusing himself from all AAA matters,' " and no further action would be taken on Kaplan's motion. (*Emerald Aero, supra*, 9 Cal.App.5th at p. 1136.) The AAA administrator declined to appoint a new arbitrator, stating the matter was now within the "purview of the [c]ourt." (*Ibid.*)

The parties then filed motions in the superior court. Kaplan sought to vacate the award, and plaintiffs sought to confirm the award. The court agreed with plaintiffs' position and entered judgment awarding them \$30,835,152.57.

C. *First Appellate Proceedings: Emerald Aero decision*

Kaplan appealed this judgment. (*Emerald Aero, supra*, 9 Cal.App.5th 1125.) In his appellate briefs, he recognized a court's limited authority to review an arbitration award, but invoked two statutory exceptions. First, he argued the award must be vacated because the arbitrator erroneously held the hearing in his absence while criminal sentencing proceedings were pending against him. (*Id.* at p. 1138; see § 1286.2, subd. (a)(5) [a court shall vacate an arbitration award if "[t]he rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown"].) Second, he argued he had inadequate notice that plaintiffs sought punitive damages and therefore the arbitrator exceeded his powers in awarding the damages. (*Emerald Aero*, at p. 1138; see § 1286.2, subd. (a)(4) [a court shall vacate an arbitration award if "[t]he arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted"].)

We rejected the first argument, and agreed with the second. (*Emerald Aero, supra*, 9 Cal.App.5th at pp. 1138-1146.) On the first argument, we found the exception inapplicable because Kaplan had 19 days' prior notice of the arbitration hearing, and never objected to the hearing or asked for a stay or continuance, nor did he notify the arbitrator that the arbitration would conflict with his sentencing hearing. (*Id.* at p. 1138.)

Under the applicable statutes, an arbitrator may hold a hearing in the absence of a party, if the party "has been duly notified" to appear at the hearing. (§ 1282.2, subd. (e).)

On the second argument, we stated that although a court generally cannot review an arbitrator's punitive damage award for legal or factual error, a party can successfully challenge an award if the relief granted was in violation of restrictions in the arbitration agreement or the arbitration rules. (*Emerald Aero, supra*, 9 Cal.App.5th at pp. 1139-1140, citing *Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 367 (*Advanced Micro*).) We found the arbitrator's punitive damage award violated the applicable AAA rules (incorporated into the parties' contract) requiring written notice before a party could materially add to his or her arbitration claim. (*Id.* at pp. 1140-1142.) And we rejected plaintiffs' argument that they provided reasonable notice of their new punitive damages claim by emailing Kaplan a copy of their arbitration brief on the late afternoon before the arbitration hearing. (*Id.* at pp. 1141-1142.) We found this notice did not provide Kaplan with the fair opportunity to be informed of, or to defend against, the punitive damage claim. (*Ibid.*)

We concluded that "plaintiffs' counsel took unfair advantage of the situation by making a last-minute demand for more than \$30 million in punitive damages. Given the lack of fair notice, the [a]rbitrator's decision to accept this claimed amount fell outside the [a]rbitrator's authority." (*Emerald Aero, supra*, 9 Cal.App.5th at p. 1142.) We additionally discussed that "[t]he arbitration process had other procedural shortcomings that also call[ed] into question the fairness of the damages award." (*Ibid.*) We stated that

[v]iewing the totality of the[se] circumstances, we cannot conclude that Kaplan had a fair arbitration hearing on the damages issues." (*Id.* at p. 1143.)

In the Conclusion section, we summarized our legal determinations. (*Emerald Aero, supra*, 9 Cal.App.5th at p. 1146.) We first reiterated the nature of the error and then explained the remedy for this error. With respect to the error, we stated:

"The parties agree a significant portion of the Arbitrator's damages award constituted punitive damages. Under the totality of the circumstances and recognizing our narrow review authority, we conclude this award cannot stand. The Arbitrator exceeded his powers in awarding punitive damages absent meaningful prior notice to Kaplan that plaintiffs were seeking these damages, as required by the arbitration rules incorporated into the parties' contract and by procedural fairness principles." (*Ibid.*)

With respect to the remedy, we stated:

"Section 1286.2, subdivision (a)(4) provides a court 'shall vacate' an arbitration award if the 'arbitrators exceeded their powers *and* the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.' (Italics added.) In this case, we have found the Arbitrator exceeded his authority by awarding punitive damages without sufficient notice required by the parties' arbitration agreement. Because the Arbitrator did not specify the breakdown of compensatory and punitive damages in the award, we cannot correct the award by striking a portion of the award without affecting the merits of the decision. *Accordingly, our conclusion on the punitive damages award means the entire award must be vacated, and Kaplan is entitled to a new hearing on the damages amount.*" (*Ibid.*, second italics added.)

The Disposition section (which directly followed) stated: "Judgment reversed as to Kaplan. The matter is remanded with directions for the superior court to (1) vacate the judgment confirming the arbitration award as to Kaplan and (2) issue an order vacating the arbitration award against Kaplan and remanding for a new arbitration hearing on

plaintiffs' damage claims against Kaplan. [Plaintiffs] to bear appellant Kaplan's costs on appeal." (*Emerald Aero, supra*, 9 Cal.App.5th at p. 1146.)

Plaintiffs unsuccessfully petitioned for rehearing on an unrelated appellate waiver issue. But neither party petitioned or asked for clarification on the issue of the scope of the arbitrator's authority upon remand. The California Supreme Court denied plaintiffs' petition for review (which did not raise the disposition/scope issue).

D. Proceedings on Remand

After the remittitur issued, in June 2017, the superior court entered an order vacating the judgment, and "remand[ed] [the] matter for a new Arbitration Hearing on plaintiffs' damage claims against . . . Kaplan." A new arbitrator (Retired Court of Appeal Justice Carl West Anderson (Arbitrator)) was assigned to preside over the case. At the outset of the arbitration proceeding, the parties raised the issue regarding the scope of the arbitration. Plaintiffs argued the remand was limited to a determination of compensatory damages, and the right to (or amount of) punitive damages. Kaplan countered that plaintiffs were required to prove liability and damages "because liability was never determined as to Kaplan in the prior arbitration nor were specific findings made as to the validity of [c]laimants' damages claims . . ."

After a hearing, the Arbitrator issued a written decision agreeing with Kaplan. In explaining his reasoning, the Arbitrator recognized that this court had remanded for a new hearing on the damages amount, but said he was "frustrated" by the prior arbitrator's "failure to specify which cause(s) of action he found to be proven against Kaplan." He

noted that plaintiffs "apparently were frustrated as well" as they sought clarification of the issue shortly after the first arbitration award was issued. The Arbitrator then stated:

"Because we cannot compute damages for liability for an unknown and unproven cause of action, we must revert to the state of this arbitration before the pre-hearing brief by [plaintiffs] was filed on the day before the . . . hearing. At that time the operative pleading was listed by the AAA in its 'Claim Summary' . . . as follows: 'Claim Amount: \$1,000,000.00; Claim Description: Plaintiffs base their claim as those outlined in plaintiffs complaint . . . which includes allegations of fraud, breach of fiduciary duty and aiding and abetting. . . . [¶] That Claim Summary . . . will be the operative pleading of this arbitration."

As to the claimed damages, the Arbitrator reiterated that plaintiffs would be bound by their \$1 million request in their AAA claim summary, and not their \$10 million claim in the complaint. The Arbitrator also concluded that plaintiffs would not be entitled to recover any punitive damages. On this latter point, the Arbitrator stated:

"The only reasonable conclusion to be drawn from the [Court of Appeal] opinion is that had the [a]rbitrator specified the exact amount of punitive damages that were being awarded, they would have been stricken. Likewise, had the arbitrator specified the compensatory damages to be awarded, any excess above \$1,000,000.00 would also have been stricken. The [Court of Appeal] clearly found that the arbitrator had no authority, i.e., jurisdiction, to make such awards because Claimants had not given the appropriate written notice of the increased claim, and the arbitrator had not given Respondents the appropriate [notice] to file an answer—both obligations required by AAA [rules]."

In February 2018, the Arbitrator conducted a two-day evidentiary hearing, and then held closing arguments by telephone conference two months later. After considering the evidence and arguments, the Arbitrator issued an interim award finding plaintiffs did not prove Kaplan "breached any fiduciary duty or other obligations to

them." In a detailed explanation of his factual findings, the Arbitrator discussed the numerous theories underlying plaintiffs' breach of fiduciary duty claim, and found plaintiffs did not show a basis for liability on any of these theories. In the final award, the Arbitrator ordered plaintiffs to pay Kaplan \$258,181.03 in prevailing party attorney fees.

Kaplan moved for confirmation of the award in the superior court, and plaintiffs opposed the motion. Plaintiffs raised several objections, including that the Arbitrator exceeded the scope of his authority by requiring a retrial on Kaplan's liability "in violation of the Court of Appeal's and this court's opinions and order that *only* the issue of the *amount* of damages were to be re-tried in arbitration." The trial court rejected this argument, stating "The Court of Appeal vacated the entire previous arbitration award and thus did not limit the scope of the new arbitration hearing on remand. . . ." After disagreeing with plaintiffs' additional challenges, the court confirmed the award and entered judgment for Kaplan, including the \$258,181.03 attorney fees award plus interest of \$10,445.13.

DISCUSSION

Plaintiffs contend the court erred in confirming the award because the Arbitrator exceeded his authority by reconsidering liability issues in the second arbitration. We agree.

Under California and federal law, there is a strong public policy favoring arbitration, and a court generally has no authority to review the merits of the arbitrator's decision. (*Branches Neighborhood Corp. v. CalAtlantic Group, Inc.* (2018) 26

Cal.App.5th 743, 750.) "By obtaining the many benefits of private arbitration, the parties to an arbitration agreement accept the risk of 'an erroneous decision by the arbitrator.' " (*Emerald Aero, supra*, 9 Cal.App.5th at p. 1138.)

But the Legislature has provided specific exceptions to this general rule. One applies here: section 1286.2, subdivision (a)(4), which states a "court shall vacate the award if the court determines . . . [t]he arbitrator[] exceeded [his] powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted."

The Arbitrator exceeded his powers when he permitted the parties to relitigate the liability issues. In *Emerald Aero*, we found the \$30 million damage award must be vacated because Kaplan was not given adequate notice of the punitive damages claim and there was no reasonable basis to determine conclusively the portion of this award that reflected compensatory damages and how much of the award reflected punitive damages. (*Emerald Aero, supra*, 9 Cal.App.5th at pp. 1138-1144, 1146.) And we stated the matter must therefore be remanded back to arbitration for a redetermination of the appropriate damages amount. (*Id.* at p. 1146.) Although we did not explicitly state the arbitrator was precluded from reopening the liability issues, this result necessarily followed based on our clear statements that we were remanding the matter for a retrial on the damage issues, and our rejection of Kaplan's arguments that the entire award must be vacated because the arbitrator did not continue the arbitration hearing while criminal sentencing proceedings were pending against him. (*Id.* at pp. 1138-1144, 1146.)

When an appellate court remands a matter to a lower court, the court has the power "to act only in accordance with the direction of the reviewing court." (*Hampton v. Superior Court of Los Angeles County* (1952) 38 Cal.2d 652, 655; *Ayyad v. Sprint Spectrum, L.P.* (2012) 210 Cal.App.4th 851, 859 (*Ayyad*); *Butler v. Superior Court* (2002) 104 Cal.App.4th 979, 982.) An action that does not conform to those directions is "void." (*Hampton*, at p. 655; *Ayyad*, at p. 859.) This rule is jurisdictional. (*Ibid.*)

Although this rule generally arises in the context of a trial court's actions after a remand, it logically extends to this situation where our directions concerned matters to be resolved in an arbitration. An arbitrator is authorized to decide only those matters that are submitted in the arbitration. (See *Kelly Sutherlin McLeod Architecture, Inc. v. Schneickert* (2011) 194 Cal.App.4th 519, 528-529.) In this case, the submission was defined by our prior decision. The trial court properly remanded the matter to arbitration by quoting our statement in the Disposition section, but it erred by confirming the award when the Arbitrator did not follow that direction.

Kaplan contends we should not rely on our own interpretation of our own appellate decision, and instead we should defer to the Arbitrator's assessment of his authority. We disagree. It is well settled that when an appellate court remands a matter to a trial court, the question whether the trial court acted outside those directions is subject to de novo review. (*Ayyad, supra*, 210 Cal.App.4th at p. 859.) This same standard applies when an arbitration award is vacated and the matter is remanded (with directions) for further arbitration proceedings. It is for the reviewing court to

independently decide whether its own remand order was followed by the trial court and the arbitrator.

In support of a contrary rule, Kaplan cites *Advanced Micro, supra*, 9 Cal.4th 362, in which the high court held a highly deferential review standard applies when a party challenges an arbitrator's selection of a particular remedy. (*Id.* at pp. 372-382.) That issue is not before us. We are not evaluating the merits of the Arbitrator's determination. Rather, we are reviewing the issue whether the trial court and the Arbitrator correctly interpreted our directions. That review remains subject to a de novo standard. We are not required to defer to the Arbitrator's interpretation.

Kaplan argues that statements in our *Emerald Aero* opinion reflect a conclusion that the entire arbitration proceeding was flawed and therefore we must have intended to vacate the entire award. Kaplan takes these comments out of context. After concluding that Kaplan lacked notice of the punitive damage claim *in violation of the applicable arbitration contract and rules*, we identified "*other procedural shortcomings that also call into question the fairness of the damages award.*" (*Emerald Aero, supra*, 9 Cal.App.5th at p. 1142, italics added.) Those included the substantial disparity between the complaint's damage allegations (\$10 million plus) and the arbitration claim's damage request (\$1 million); the substantial *amount* of the damages awarded (\$30 million plus); problems with notice of certain earlier hearings; and the AAA administrator's actions after the final award was issued. (*Id.* at pp. 1143-1144.) We found that viewing the "totality" of these circumstances *and* the lack of adequate notice of the punitive damage

claim, we could not "conclude that Kaplan had a fair arbitration hearing *on the damages issues.*" (*Id.* at p. 1143, italics added.)

Reasonably read, our discussion about the other factors relevant to our determination that the arbitrator had exceeded his authority in its damage award did not suggest we were intending to remand for a new arbitration proceeding on both liability and damage claims. Given our very narrow role in reviewing arbitration awards, such a conclusion would not have been appropriate. And to the extent there was any confusion, the Disposition section—read together with the Conclusion section—would have eliminated any ambiguity. In the Conclusion section, we clearly stated the reasons we were reversing the trial court's confirmation of the award and what should happen next:

"Section 1286.2, subdivision (a)(4) provides a court 'shall vacate' an arbitration award if the 'arbitrators exceeded their powers *and* the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.' (Italics added.) In this case, we have found the Arbitrator exceeded his authority by awarding punitive damages without sufficient notice required by the parties' arbitration agreement. Because the Arbitrator did not specify the breakdown of compensatory and punitive damages in the award, we cannot correct the award by striking a portion of the award without affecting the merits of the decision. Accordingly, our conclusion on the punitive damages award means the entire award must be vacated, **and Kaplan is entitled to a new hearing on the damages amount.**" (*Emerald Aero, supra*, 9 Cal.App.5th at p. 1146, bolding added.)

The Disposition section similarly stated:

"Judgment reversed as to Kaplan. The matter is remanded with directions for the superior court to (1) vacate the judgment confirming the arbitration award as to Kaplan and (2) issue an order vacating the arbitration award against Kaplan and remanding for a new arbitration hearing **on plaintiffs' damage claims against Kaplan.**" (*Ibid.*, bolding added.)

Although we did not include the word damage "amount" in the Disposition section, when a reviewing court remands a matter, its Disposition must be read in conjunction with the opinion as a whole. (*Ducoing Management, Inc. v. Superior Court* (2015) 234 Cal.App.4th 306, 313; see *Ayyad, supra*, 210 Cal.App.4th at p. 859.) Reading the Disposition section with the entire opinion (including the Conclusion section), the *Emerald Aero* opinion makes clear that only damages were to be relitigated. Although we did not explicitly state that the liability finding remained binding on the parties, this result was inherent in our express remand for a "new arbitration hearing on plaintiffs' damage claims against Kaplan." (*Emerald Aero, supra*, 9 Cal.App.5th at p. 1146.)

This disposition is consistent with the settled rule that where the errors concerned only the damages portion of the judgment, a reviewing court has the authority to order a limited remand on damages only. (See *Asgari v. City of Los Angeles* (1997) 15 Cal.4th 744, 760; *Capelouto v. Kaiser Foundation Hospitals* (1972) 7 Cal.3d 889, 898; *Gillan v. City of San Marino* (2007) 147 Cal.App.4th 1033, 1052-1053; see also *Curties v. Hill Top Developers, Inc.* (1993) 14 Cal.App.4th 1651, 1656.)

Notably, Kaplan does not argue that this court did not have the authority to order a limited retrial in the arbitration proceeding. At most, he suggests a limited retrial was not practical or possible in this case because of the general nature of the first arbitrator's determination (without specifying reasons or grounds for his conclusion). However, the time to raise that objection was in the prior proceeding, such as in a rehearing petition. (See *English v. Olympic Auditorium, Inc.* (1935) 10 Cal.App.2d 196, 201.) The *Emerald Aero* opinion has long been final, and Kaplan was not justified in waiting until the matter

was before the second arbitrator to argue (inaccurately) that our remand was an unqualified reversal and not limited to damages. (See *English*, at p. 201.)

Moreover, there is nothing in the record showing that a limited retrial was not possible, or would have been unduly prejudicial to either party. In permitting a retrial on liability, the second Arbitrator said that "we cannot compute damages for liability for an unknown and unproven cause of action." However, the first arbitrator's award supports that the causes of action *were* known and established. In finding in plaintiffs' favor after the evidentiary hearing, the first arbitrator found plaintiffs met their burden to prove the claimed breaches of fiduciary duty by Kaplan and/or accepted the truth of the complaint's allegations (together with the evidence) after Kaplan failed to appear to present a defense at the hearing.

Thus, based on the complaint, and the arbitration brief with the attached exhibits filed in the first arbitration hearing,⁴ the second Arbitrator and parties had a reasonable basis to determine the nature of those findings on the breaches of fiduciary duty. Relying on these determinations and pursuant to our directions, the second Arbitrator was then required to evaluate the evidence and determine the amount of plaintiffs' damages resulting from these breaches of fiduciary duty.

Kaplan's argument throughout his briefs that the *Emerald Aero* decision "constituted an unqualified reversal" misreads our decision. The opinion attached to

⁴ On our own motion, we take judicial notice of this brief that was contained in the record in the *Emerald Aero* appeal, and was before the Arbitrator in the current proceeding. (Evid. Code, § 452, subd. (d).)

the remittitur states this court was reversing the judgment "*with directions*" and was remanding with a specific mandate for the trial court to "issue an order vacating the arbitration award . . . and remanding for a new arbitration hearing on plaintiffs' damage claims against Kaplan." (Italics added.) The reversal was not "unqualified" and did not permit Kaplan to relitigate the first arbitrator's findings that plaintiffs had proved Kaplan's liability for the breach of fiduciary duty claims.

We reject Kaplan's alternate argument that even assuming this court directed a new trial only on the damages issues, plaintiffs forfeited their right to rely on the first arbitrator's liability findings by raising new theories in support of their breach of fiduciary claim. Plaintiffs added to their claims only after the second Arbitrator found that Kaplan would be entitled to relitigate the liability issues. We agree with plaintiffs that under those circumstances they did not forfeit their right to challenge the arbitrator's adverse determination *on the proper scope of the arbitration*. (See *Warner Constr. Corp. v. Los Angeles* (1970) 2 Cal.3d 285, 299, fn. 17; see also *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 212-213.)

In their appellate briefs, plaintiffs challenge the second Arbitrator's attorney fees award. Because we are reversing the judgment confirming the award, the reversal necessarily vacates the attorney fees award. We thus do not reach plaintiffs' appellate contentions challenging this portion of the award.

Proceedings on Remand

We have determined the second Arbitrator acted beyond his authority in permitting the parties to relitigate the liability issues, and the award cannot be corrected

without affecting the merits of the decision. We therefore vacate the award. (§ 1286.2, subd. (a)(4).) On remand, the arbitrator and the parties should accept the liability finding on plaintiffs' breach of fiduciary/fraud claims against Kaplan, and the arbitrator should determine the amount of plaintiffs' damages (if any) resulting from Kaplan's wrongful conduct. In determining the nature of the liability findings, the arbitrator is authorized to consider plaintiffs' complaint, plaintiffs' Arbitration brief and attached evidence filed in the prior proceedings, and any arguments provided by the parties.

For guidance to the parties on remand, the Arbitrator did not act beyond the scope of his authority in deciding that plaintiffs were not entitled to recover punitive damages, and/or that the compensatory damage amount would be limited to \$1 million requested in plaintiffs' arbitration-claim demand. By stating this maximum figure, we do not intend to suggest that plaintiffs are entitled to this amount or to any amount of damages. To recover damages, they must prove the amount of damages suffered from Kaplan's breaches of fiduciary duty.

DISPOSITION

Judgment reversed. The matter is remanded with directions for the superior court to (1) vacate the judgment confirming the arbitration award and attorneys fees as to Kaplan; and (2) issue an order vacating the arbitration award against Kaplan and remanding for a new limited arbitration hearing solely on the issue of the amount of damages, if any, suffered by plaintiffs as a result of Kaplan's wrongful conduct. Appellants to recover their costs on appeal.

HALLER, J.

WE CONCUR:

McCONNELL, P. J.

HUFFMAN, J.